# Arbitration Reform in Sweden

*by* KAJ HOBÉR*

## I. INTRODUCTION

1 APRIL 1999 is an important date in the history of Swedish arbitration. On that date the new Swedish Arbitration Act (the Act) entered into force. On the same date, the new Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC Rules) also took effect. After years of preparation, the 1929 Swedish Arbitration Act and the 1929 Act Concerning Foreign Arbitration Agreements and Awards were replaced by the new Act. The SCC Rules have been prepared on the basis of, and taking account of, the Act. The Act and the Rules together constitute an efficient and comprehensive collection of arbitration provisions and rules relating to arbitrations in Sweden.

Commercial arbitration has a long tradition in Sweden. It probably goes back to the fourteenth century. The first comprehensive Swedish Arbitration Act was not, however, adopted until 1887. It was replaced by the 1929 Arbitration Act. For 70 years this Act provided a satisfactory legislative framework for commercial arbitration - both domestic and international - in Sweden. The explanation for this state of affairs is in all likelihood the autonomy which the arbitral process has always enjoyed under Swedish law. Swedish courts have mostly adhered to a policy of non-interference with arbitration. Arbitral awards are set aside only on narrowly defined procedural grounds, *e.g.* if the procedure violates the agreement of the parties or if it fails to meet minimum standards of due process. It has long been a well-established principle that arbitral awards cannot be reviewed or retried on the merits. The underlying philosophy is, and has always been, that of freedom of contract, trust in the arbitrators and recognition of the advantages of a single, privately administered dispute settlement mechanism. The Act is also permeated by this philosophy.

As a result of increased commercial activity both in Sweden and internationally over the past decades and of the subsequent increase in the number of arbitrations

---

* Partner, Mannheimer Swartling, Stockholm; Professor of East European Commercial Law, Uppsala University; Member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce; Commissioner of the United Nations Compensation Commission, Geneva. Mr Hobér was a member of the committee of experts which prepared the new Swedish Arbitration Act.

ARBITRATION INTERNATIONAL, Vol. 17, No. 4
© LCIA, 2001

resulting from such activity, it was felt that the time had come to revise Swedish arbitration legislation. In 1992, at the suggestion of the SCC Institute, the Swedish Government issued instructions for the preparation of a new Arbitration Act and appointed a committee of experts to prepare a draft Act.

The report of the committee of experts, including a draft new Arbitration Act, was published in June 1994. In accordance with Swedish practice, the Ministry of Justice referred the report for comments to a number of Swedish authorities, courts, bodies and associations which were asked to provide comments in writing. The SCC Institute, in cooperation with the Ministry, distributed an English summary of the report to a number of foreign experts soliciting their views on the draft Arbitration Act. Subsequent to the review by the Ministry of Justice of the draft Arbitration Act, a Parliamentary Bill was introduced in 1998. The Act was adopted by Parliament on 4 March 1999 and, as stated *supra*, entered into force on 1 April 1999.

The Act, which, as mentioned above, replaces both the 1929 Arbitration Act and the 1929 Act Concerning Foreign Arbitration Agreements and Awards, is still based on the 1929 legislation, but adapts and improves on the older legislation by incorporating principles from practice and case law. The Act also takes account of developments in international arbitration, notably the UNCITRAL Model Law on International Commercial Arbitration. The Act, like the previous one, applies equally to domestic and international arbitrations, but nevertheless conforms closely to the Model Law.

By way of introduction, I shall briefly summarise some of the more important changes introduced by the Act.

### *(a) The Arbitration Agreement*

Section 48 contains an important and new rule relating to the law governing the arbitration agreements proper - *i.e.* as distinct from the commercial contract in which the arbitration agreement is included - which have an international connection. Section 48 provides that, unless the parties have chosen the applicable law, the arbitration agreement is governed by the law of the country in which the proceedings have taken place, or are to take place, in accordance with the arbitration agreement.

### *(b) Arbitrability*

The Act is based on the same fundamental definition of arbitrability as the previous Act, *i.e.* that any dispute in respect of which the parties are entitled to conclude a settlement is arbitrable.

Section 1 of the Act does, however, set out new provisions which widen the power of arbitral tribunals beyond the jurisdiction of the courts. First, it stipulates that a dispute concerning the mere existence of a particular fact is arbitrable. Secondly, section 1 provides that arbitrators may fill gaps in contracts. Finally, a new statutory provision is included in the last sentence of section 1, to the effect that arbitrators are entitled to rule on the effects as between the parties of competition laws.

### *(c) Separability*

The separability of an arbitration agreement from the commercial contract - a principle which has long been accepted in Swedish arbitration law - has found its statutory confirmation in the first paragraph of section 3.

The logical and necessary concomitant of the separability doctrine - the doctrine of *Kompetenz-Kompetenz* - is enshrined in section 2 of the Act. This doctrine, which allows an arbitral tribunal to rule on its own jurisdiction whenever the existence or validity of the arbitration agreement is challenged, was developed in case law before being included in the new legislation.

### *(d) The Procedure*

The Act introduces new rules in section 23 with respect to amendments of claims and the admissibility of counterclaims. As a result, the respondent may introduce its own prayer for relief, provided it is covered by the arbitration agreement and provided it is not deemed inappropriate to accept it for consideration, having regard to the point of time at which it is introduced or to other circumstances. In the course of the proceedings, each party may, on the same conditions, amend or supplement prayers for relief introduced at an earlier stage and rely on new circumstances in support of its case.

### *(e) Decisions and Awards*

The Act endows the arbitrators with a wide discretion to issue separate awards, eliminating the need for approval by both parties. The Act also introduces a right for the respondent to have the dispute resolved, even if the claimant withdraws its claim. Section 28 of the Act stipulates that if a party withdraws a prayer for relief, the arbitrators shall dismiss that part of the dispute, unless the other party requests the arbitrators to rule on the prayer for relief.

Under the previous Act, arbitrators made decisions by majority vote. This rule has now been abandoned. Section 30, paragraph 2, of the Act, stipulates that, unless the parties have agreed otherwise, the opinion shared by the majority of the arbitrators participating in the deliberations shall prevail, but that the chairman shall decide if no majority is attained.

Section 30, paragraph 1, introduces yet another new provision preventing an arbitrator from obstructing the proceedings by failing to attend deliberations of the tribunal.

### *(f) Interim Security Measures*

The Act includes a new provision on interim security measures of protection. Section 25, paragraph 4, provides that unless the parties have agreed otherwise, the arbitrators may, at the request of a party, decide that the other party must take certain measures during the course of the proceedings to secure the claim.

*(g) Invalidity, Setting Aside and Remission of Awards; Exclusion Agreements*

The procedural grounds on the basis of which an arbitral award may be challenged remain by and large the same. These provisions are exhaustive, such that arbitral awards cannot be attacked on any grounds other than those enumerated in the relevant provisions. Some of the grounds have been slightly amended with a view to adapting the statutory language to that of the relevant provisions in the UNCITRAL Model Law. A new feature of the Act is a provision allowing non-Swedish parties to enter into exclusion agreements by which they waive in advance, wholly or partially, the applicability of the grounds for setting aside an award enumerated in section 34 of the Act.

*(h) The SCC Rules*

As mentioned *supra*, the Arbitration Institute of the Stockholm Chamber of Commerce has adopted new arbitration rules, the SCC Rules, which also entered into effect on 1 April 1999.

The SCC Rules, like the Act, apply equally to domestic and international arbitrations. The Rules may also be applied in arbitrations outside Sweden.

The previous SCC Rules were adopted in 1988. The changes and amendments in the new SCC Rules are therefore relatively few. Most of them have been introduced as a consequence of the Act. A number of new provisions are nevertheless worthy of note. They are highlighted below.

The most important change are the new rules on arbitration costs. They signify an important change of principle. Under the 1988 SCC Rules, the arbitrators determined their own fees. Their decision was based mainly on the time spent on the case, although the Rules also suggested that the complexity of the case, the amount in dispute and other circumstances were to be taken into account.

Under the SCC Rules, the arbitrators' fees are fixed by the SCC Institute based on the amount in dispute. This is the procedure most commonly used among international arbitration institutions. The main advantage of such a system is that it enables parties to calculate and predict the costs of arbitration more accurately.

Another important new provision deals with the applicable substantive law. Article 24 of the SCC Rules confirms current practice with regard to applicable law, *i.e.* that the greatest possible freedom is given to the parties to choose the law applicable to their contract. The provision makes clear that the parties may agree not only on any national law, but also on any principles of law, and that they may empower the arbitral tribunal to act as *amiable compositeur* or *ex aequo et bono*.

In practice, however, parties often fail to agree on the applicable law. In such cases article 24 empowers the arbitral tribunal to apply the law, or principles of law, it deems most appropriate, without having resort to any conflict of laws rules.

Under the SCC Rules, three arbitrators are appointed unless otherwise agreed by the parties. Each party appoints one arbitrator and the SCC Institute a third, to act as chairman of the arbitral tribunal. The parties may, however, agree on a method for appointing the third arbitrator other than appointment by the SCC Institute.

Moreover, article 16:1 of the SCC Rules now empowers the SCC Institute, unless the parties have specified the number of arbitrators, to decide that the dispute be settled by a sole arbitrator. In making such a decision the Institute is to take into account, *inter alia*, the complexity of the case and the amount in dispute.

The time for rendering the award has been reduced considerably and is now six months instead of one year, as under the previous SCC Rules.

In the following I shall briefly comment on the Act and the SCC Rules, focusing on the new provisions, under the following headings:

- the arbitration agreement;
- the arbitrators;
- the procedure;
- the award; and
- the finality and enforceability of awards.

While the focus will be on the new provisions, it will occasionally be necessary to provide background and general information going beyond the new provisions.

## II. THE ARBITRATION AGREEMENT

### *(a) Applicable Law*

As mentioned *supra*, one of the new provisions in the Act is section 48, which for the first time introduces a choice of law rule with respect to the arbitration agreement proper. Section 48 clearly proceeds on the assumption that the arbitration agreement is independent and separate from the contract into which it has been incorporated and therefore not automatically governed by the same law as the commercial contract.

In the old legislation, the 1929 Act Concerning Foreign Arbitration Agreements and Arbitral Awards - implementing the provisions of the New York Convention - there were provisions dealing with the law applicable to the arbitration agreement, but only in situations when enforcement of a foreign award was sought. There were no provisions addressing the question of applicable law in general, and prior to the rendering of an award. That is why it was deemed desirable to introduce a more general provision on the law applicable to the arbitration agreement.

The starting point in section 48 is party autonomy. Consequently, if the parties have chosen a law to be applied to the arbitration agreement, such choice of law will be honoured. It is probably very unusual, however, that parties make a separate choice of law with respect to the arbitration agreement. Section 48 goes on to say that, if no choice of law has been made by the parties, the arbitration agreement will be governed by the law of the country in which the arbitration has taken place as a result of the agreement of the parties, or if no proceedings have yet taken place, where they are to take place pursuant to the agreement of the parties. This

corresponds to the approach taken in Article V of the New York Convention, where the place of arbitration plays a decisive role. It thus follows from section 48 that if the parties have agreed on the place of arbitration in their arbitration clause, the law of that country will be applied to determine the validity of the arbitration agreement and to interpret it. If no place of arbitration has been agreed, but the arbitration agreement empowers the arbitrators, or an arbitration institution, to make the choice, the law of the place of arbitration so chosen will be applied. In situations when not even this is the case, and no proceedings have in fact taken place, recourse must be had to the general rules and principles of - arguably - Swedish conflict of laws rules, the ultimate purpose of which is to determine the will of the parties in this respect. One aspect to take into consideration in such a situation is whether the commercial contract has a governing law clause. If this is the case, it would seem reasonable to assume, as a general rule, that the parties have intended the law so chosen to apply to the arbitration clause as well. This can only be an assumption, however. If other circumstances point to another law, such circumstances must be taken into consideration.

For practical purposes, section 48 means that when arbitrations take place in Sweden, Swedish law will usually be applied to the arbitration agreement, unless the parties have chosen another law to be applied to it.

If an arbitration takes place in Sweden pursuant to an arbitration agreement which is governed by foreign law as a result of the parties' choice of law, such foreign law will govern the agreement as explained *supra*. It is important to note, however, that in one respect Swedish law will nevertheless play a decisive role, *i.e.* as regards the effect of an arbitration agreement as a bar to court proceedings.

It follows from section 49 of the Act, read together with section 4 of the Act, to which reference is made in section 49, that to bar a court of law from taking jurisdiction over a dispute, the arbitration agreement in question must be valid pursuant to the (foreign) law applicable to it *and* the issue(s) in question must *also* be arbitrable under Swedish law. The reason for this double requirement is that an award rendered in Sweden dealing with an issue which is not arbitrable under Swedish law is invalid pursuant to section 33 of the Act.

### *(b) Arbitrability*

The Act confirms the conceptual definition of arbitrability found in the old Act, *i.e.* that any dispute in respect of which the parties may reach a settlement by agreement is arbitrable. In comparison with the old Act, however, section 1 of the Act has introduced a number of provisions which enlarge the scope of arbitrability.

First, in the first paragraph of section 1, third sentence, it is explicitly stated that the dispute may concern the mere existence, or non-existence, of a particular fact. In so doing the Act removes the uncertainty which prevailed under the old Act in this respect. To be arbitrable the fact in question does not need to be related to any legal consequences, even though this would typically be the situation in practice.

Secondly, the second paragraph of section 1 explicitly states that arbitrators may interpret and fill gaps in contracts.

This would be relevant mostly in long-term contracts, *e.g.* concerning industrial cooperation and supply of natural resources and raw materials. While this is a welcome clarification, it is doubtful that the provision adds very much to the already existing powers of the arbitrators. It would seem that interpretation of and gap-filling with respect to contracts form part of the customary methods of interpretation of contracts and as such would normally be covered anyway by the arbitration agreement in question. It should be pointed out in this connection that while arbitrators have the right to fill gaps in contracts, they can exercise such a right only within the limits set by the parties. Consequently, the arbitrators may not, *e.g.* rule *ultra petita.*

Thirdly, a new important provision is found in the third paragraph of section 1, where it is said that the arbitrators may rule on the civil law effects of competition laws as between the parties. In Sweden, as in many other jurisdictions, it has been debated whether and to what extent anti-trust issues are arbitrable. The clear position taken by the Swedish legislator in the Act is that such issues are arbitrable, in so far as the relationship between the parties to the dispute is concerned. It is thus important to remember that the relevant anti-trust authorities retain jurisdiction over anti-trust issues which are not *inter partes*, but which involve the public interest. It must also be noted that while anti-trust issues are arbitrable, the arbitrators have neither the right nor the duty to apply relevant anti-trust legislation *ex officio*, but are dependent on such issues being raised by either of the parties.

### *(c) Separability and Kompetenz-Kompetenz*

The doctrine of separability is a well-established principle of Swedish arbitration law. It has now for the first time found its statutory expression in section 3 of the Act. This section stipulates that when ruling on the validity of an arbitration agreement - which forms part of another agreement, usually a commercial contract - in conjunction with determining the jurisdiction of the arbitrators, the arbitration agreement shall constitute a separate agreement. It is worth noting that the doctrine of separability applies also if an agreement, *i.e.* the commercial contract in question, is void *ab initio.* In practice the same factual circumstances will often surround both the arbitration agreement and the commercial contract. In such situations the arbitration agreement may also be invalid, not as a result of the fact that the commercial contract is invalid *ab initio*, however, but because the same factual circumstances apply to the arbitration agreement as well.

The German doctrine of *Kompetenz-Kompetenz*, which is recognised in Article 16(1) of the UNCITRAL Model Law, is now expressly enshrined in section 2, paragraph 1, of the Act. In short this doctrine empowers arbitrators to rule on their own jurisdiction whenever the existence or validity of the arbitration agreement is challenged. Section 2 provides that the arbitrators may rule on their own jurisdiction to decide the dispute, but that this does not prevent a court of law

from ruling on such an issue at the request of a party. It also provides that the arbitrators may continue the arbitral proceedings pending the determination by the court. It is thus up to the arbitrators to decide – at the request of either party – whether to stay the arbitral proceedings awaiting the decision of the court. Once a court of law has rendered a decision on the validity of the arbitration agreement, such decision is binding on arbitrators and parties alike. Consequently, by proceeding with the arbitration, the arbitrators do take a certain risk, *i.e.* that time and money will have been spent in vain, if a court of law rules that the arbitration agreement is invalid or inapplicable.

The second paragraph of section 2 stipulates that if the arbitrators have decided during the proceedings that they have jurisdiction, such a decision is not binding. It is important to note that such a conclusion of the arbitrators is expressed in the form of a *decision*, rather than in an *award*. Such a decision is not final and binding either on the parties or on the arbitrators. If other circumstances come to light during the proceedings which cause the arbitrators to revise their previous decision on jurisdiction, they are free to do so. The fact that a decision on jurisdiction is not final and binding also means that there is no need for a party to initiate a court action with respect to the decision with the view to preserving its right to challenge the resulting arbitral award. The party concerned will have that right anyway. On the other hand, it must be noted that if the party in question continues to participate in the proceedings without protesting, it may be deemed to have waived its objection.

If the arbitrators conclude that they do not have jurisdiction such conclusion will be expressed in an arbitral *award*. Such an award may be appealed to the competent Court of Appeal within three months pursuant to the provisions of section 36. This means that a party is entitled to attack an award by which arbitrators have decided that they do not have jurisdiction based on the conclusion that the dispute falls outside the scope of a valid arbitration agreement, or is not arbitrable, but that a party must do so within three months of receipt of the award.

Conversely, as stated above, arbitrators who consider that they have jurisdiction are at liberty to so rule during the proceedings by way of a *decision*. Such a decision may be reversed or amended by the arbitrators. A party who is dissatisfied with such a decision can either institute a court action during the continued arbitral proceedings or await the final award which embodies the decision and challenge the award within three months. In the latter case the party must, however, as already mentioned, file a protest with the arbitrators to avoid the conclusion that it has waived its objection, and to avoid the preclusion which follows from the second paragraph of section 34 of the Act.

### *(d) The Effect of the Arbitration Agreement*

The most important effect of a valid arbitration agreement – indeed a cornerstone in any modern system of commercial arbitration – is that it serves as a bar to court proceedings. This has long been recognised in Swedish law, but has not found any direct statutory expression. Section 4 of the Act remedies this situation. This

section stipulates that a court may not, over an objection of a party, rule on an issue which 'pursuant to an arbitration agreement, shall be decided by arbitrators'. It is important to note not only that an objection to the jurisdiction of the court must be made by a party, but also that such objection must be made 'on the first occasion that a party states his case on the merits in the court'. If a party fails to make such objection, it becomes ineffective unless the party had a valid reason for not making the objection and subsequently made it as soon as that reason ceased to exist. Also, the arbitration agreement does not prevent a party from requesting decisions by a court of law concerning security measures with respect to claims under consideration by the arbitral tribunal.

Section 4 of the Act must be read in conjunction with section 5 of the Act which sets out situations when an arbitration agreement does *not* bar court proceedings.

Pursuant to section 5, a party may lose its right to rely on the arbitration agreement if it has:

- disputed a request for arbitration by the other party;
- failed to appoint its arbitrator in time; or
- failed to pay its share of the requested security for compensation to the arbitrators.

The above circumstances could be characterised as breaches of the arbitration agreement, sufficiently serious to allow the other party to treat the agreement as terminated. Generally speaking, there could be - and probably are - other material breaches of the arbitration agreement which would entitle the other party to terminate the agreement. The Act is, however, silent on this point. Even if the cases mentioned in section 5 may not be exhaustive, it is probably difficult to succeed in terminating the arbitration agreement on grounds which are not specifically mentioned in section 5, and which do not relate to general grounds for the invalidity of contracts such as fraud, duress etc.

### *(e) Arbitration Agreements and Third Parties*

Whether and to what extent an arbitration agreement is binding on a third party is a controversial issue, given the natural starting point that an agreement can only bind the parties to it. In the report prepared by the committee of experts an attempt was made to resolve the various issues involved in this connection. The attempt was made against the background of several requests from interested organisations and bodies, as well as from practising lawyers. When the Ministry of Justice presented its Bill to Parliament, the proposal had been deleted. One reason was the sheer complexity of the issues, in the sense that there is such a multitude of possible factual situations so as to make comprehensive legislation practically impossible. The proposal had also met severe criticism from many quarters. Another reason was that by the time the Government Bill was under preparation, the Supreme Court had rendered a decision which addressed several of the issues in question, thereby providing some guidance concerning assignment

of contracts. As a result of these developments, the Act does not have any provisions on party substitution, nor otherwise on the effect on third parties of the arbitration agreement.

Starting with party substitution in the form of *universal succession* (death, bankruptcy, merger, reorganisation etc.), the generally held view is that the universal successor is bound by the arbitration clause, as is the remaining party to the contract.

As far as *singular succession* is concerned, guidance is now provided by the aforementioned decision of the Supreme Court. In short the facts were as follows: in a shipbuilding contract a Dutch shipyard, Scheepswerf Ferus Smit BV (Ferus), undertook to build a ship, which was later called MS Emja. Subsequently, a German shipping company, Emja, acquired the rights and obligations in relation to Ferus under the shipbuilding contract. Ferus retained another shipyard, Scheepswerf Bijlsma BV (Bijlsma), as sub-contractor to build the ship. In a written contract with Bijlsma, Wärtsilä undertook to deliver a diesel engine to MS Emja. This contract referred partly to the standard agreement ECE 188, including a supplement entitled 'Marine Equipment Addendum 1987', and partly, with regard to technical personnel, to the standard agreement TP 73 E. Both ECE 188 and TP 73 E contained arbitration clauses. Both clauses stipulated that Swedish law be applied. Subsequent to delivery of MS Emja to the shipping company, there were problems with the diesel engine. To make it possible for Emja to commence proceedings against Wärtsilä, Ferus and Bijlsma transferred the title to the engine to Emja. On the basis of this transfer agreement, Emja commenced an action against Wärtsilä in a local court concerning the defective engine. The issue was whether the arbitration clauses in ECE 188 and TP 73 E, which constituted part of the agreement between Bijlsma and Wärtsilä, were binding on Emja.

The Supreme Court, as well as the lower courts, accepted Wärtsilä's jurisdictional objection and concluded that Emja - as well as the original party - was bound by the arbitration clause. The Supreme Court also discussed, albeit *obiter dicta*, whether the remaining party continues to be bound by the arbitration clause in case of singular succession on the other side. The court concluded that on balance the arguments in favour of letting the remaining party continue to be bound, dominate. It added, however, that the conclusion may be different when 'special circumstances' apply. It is possible - although the Supreme Court was silent on this point - that such 'special circumstances' may include a situation where an assignment could be detrimental to the remaining party, *e.g.* because the new party lacks financial means.

For the same reasons that the Ministry of Justice did not include in its Bill any proposal as to party substitution, it decided not to propose any provision with respect to guarantees and guarantee agreements. The extent to which a guarantor is bound by, or may rely on, an arbitration clause included in a contractual document separate from the guarantee therefore remains an open question. It is possible that guidance may still be derived from several old Supreme Court cases. It should be noted, however, that all three cases address only the situation when the guarantor relies on the arbitration clause as a bar to court proceedings, which the guarantor successfully did in all these cases.

An issue which is closely related to the effect of the arbitration agreement on third parties is that of multi-party arbitration. Many attempts have been made over the years, by scholars, practitioners and arbitral institutions alike, to find the magic formula to resolve the problems resulting from multi-party arbitration. Despite heroic efforts, they have generally not been crowned with success. The reason is simply that multi-party arbitrations can take very many different forms and, almost without exception, create complicated legal situations.

The Act does not contain provisions dealing with multi-party arbitrations. As far as Swedish law is concerned, any solution in this respect must be sought on the basis of the fundamental principle of arbitration, *i.e.* freedom of contract, the will of the parties, or put differently: the initiative must always rest with the parties. One of the problems in multi-party arbitrations is the appointment of arbitrators. In multi-party contracts it is not unusual that the parties agree that the appointment of all, or some, arbitrators is to be made by an arbitral institution or by a court of law. With a view to facilitating the use of Swedish courts in this respect, the Act stipulates in section 12 that the relevant district court shall appoint arbitrators, at the request of one of the parties provided that the parties have so agreed, in additional situations to that where the court steps in and appoints an arbitrator for a party, or where two party-appointed arbitrators fail to agree on a chairman.

Also the SCC Rules have provisions intended to facilitate the appointment of arbitrators in a multi-party arbitration. The relevant provision is article 16:3 of the SCC Rules which stipulates that if multiple claimants or respondents cannot jointly agree on an arbitrator, the Arbitration Institute may appoint the arbitrator, or if special circumstance apply, all the arbitrators, unless the parties have agreed otherwise.

## III. THE ARBITRATORS

### *(a) General*

The provisions in the Act dealing with the arbitrators and their appointment are to a large extent similar to those found in the old Act. Some provisions are new, however, and the language as well as the arrangement of the provisions have been modernised.

The starting point is section 7 of the Act which stipulates that any person, having full legal capacity, may be appointed arbitrator. There are no restrictions with respect to nationality, education, profession etc. The only requirement is that an arbitrator be impartial as stipulated in section 8. This requirement applies equally to party-appointed arbitrators and other arbitrators. The concept of 'non-neutral' arbitrators is unknown in Swedish law.

Section 8 reads:

> At the request of a party, an arbitrator shall be discharged if there exists any circumstance which may diminish confidence in the arbitrator's impartiality. Such a circumstance shall always be deemed to exist:

1. where the arbitrator or a person closely associated with him is a party, or otherwise may expect considerable benefit or detriment, as a result of the outcome of the dispute;
2. where the arbitrator or a person closely associated with him is the director of a company or any other association which is a party, or otherwise represents a party or any other person who may expect considerable benefit or detriment as a result of the outcome of the dispute;
3. where the arbitrator has taken a position in the dispute, as an expert or otherwise, or has assisted a party in the preparation or conduct of his case in the dispute; or
4. where the arbitrator has received or demanded compensation in violation of section 39, second paragraph.

The rule laid down in section 8 refers to circumstances which may diminish confidence in an arbitrator's impartiality. It corresponds to article 12 of the Model Law.

The first two paragraphs of section 8, and to some extent the third, mention situations where there is not only a lack of impartiality, but also doubt as to the arbitrator's independence. In the Act, *independence* is not mentioned explicitly, but is included in the concept of impartiality. Thus, the scope of impartiality (and independence) under the Act is no different from the scope of impartiality and independence under the Model Law.

Article 17 of the SCC Rules also requires that an arbitrator be impartial and independent. Even though the language is different, there is no reason to believe that the interpretation of the SCC Rules in this respect will be different from that of the Act.

With respect to item 3 in section 8 of the Act, the intention is to cover cases where the arbitrator has been actively involved in the dispute in some capacity. It is not the idea, however, to include cases where, *e.g.* a scholar has written a book or an article, in which he has taken a position *in abstracto* with respect to a legal or technical question which is relevant to the dispute.

In the old Act there was no provision imposing a disclosure obligation on arbitrators. Provisions to this effect had, however, been introduced in the SCC Rules as in the rules of many other arbitration institutions. Such an obligation is now included in section 9 of the Act. It requires a person, who is asked to accept an appointment as arbitrator, to disclose immediately all circumstances which might cause him to be regarded as incapacitated or not impartial. He must inform the parties of such circumstances, as well as the other arbitrators, when all arbitrators have been appointed. This is a continuing obligation and thus requires him to make such disclosure throughout the course of the proceedings, as soon as he learns of any new circumstances that may cause him to lose his impartiality. Article 17 of the SCC Rules sets out similar requirements.

### *(b) Appointment of Arbitrators*

Under section 12 of the Act, the parties may determine the number of arbitrators and the manner in which they are to be appointed. If the parties have not agreed on the appointment of arbitrators, the Act provides supplementary provisions in this respect.

Section 13 of the Act stipulates that when the parties have not agreed otherwise,

the number of arbitrators shall be three. Each party shall appoint one arbitrator, and these two arbitrators shall choose the third arbitrator. Pursuant to section 20 of the Act, unless the parties have agreed otherwise, the chairman shall be the arbitrator appointed by the other arbitrators, or by the district court.

The parties may also agree on a sole arbitrator or, *e.g.* if the dispute is among several parties, on five arbitrators or more. There is no provision in the Act requiring an uneven number of arbitrators.

The respondent must, within 30 days of having received notification of the claimant's choice of arbitrator, notify the claimant of its choice. According to section 14 of the Act this rule is limited to cases where the claimant has notified the respondent of its choice of arbitrator in the request for arbitration. If the respondent does not appoint an arbitrator within the stipulated time, the claimant may ask the district court to make the appointment. When a party has appointed an arbitrator and notified the other party of the appointment, such appointment may be revoked only with the approval of the other party.

Under section 15 of the Act, the assistance of the district court may be requested by a party also in other situations, *e.g.* where two arbitrators are to appoint the third arbitrator, but fail to do so within 30 days of the appointment of the last arbitrator, and when the parties are jointly to appoint the third arbitrator, or where that appointment must be made by a third party, and the parties or the third party fail to do so within 30 days.

According to section 18 of the Act, a court of law has the duty to take decisions in the situations described above, and may refuse to do so only if it is manifest that arbitration cannot be held, *e.g.* because the issues in dispute are not arbitrable, or it is evident that there is no binding arbitration agreement.

Article 16 of the SCC Rules provides that where the parties have not agreed otherwise, the arbitral tribunal shall consist of three arbitrators. However, taking the complexity and the value of the dispute and all other circumstances into consideration, the SCC Institute may decide that there be only one arbitrator, who is to be appointed by the SCC Institute. Where there is to be more than one arbitrator, each party is to appoint an equal number of arbitrators. If a party does not appoint the arbitrator(s), he/they are appointed by the SCC Institute, which also appoints the chairman, unless the parties have agreed otherwise. If the parties are of different nationalities, the sole arbitrator, or the chairman, must have a different nationality, unless the parties agree otherwise, or special circumstances dictate it. As mentioned above, article 16:3 of the SCC Rules set out provisions for the appointment of arbitrators in multi-party disputes.

### *(c) Disqualification of Arbitrators*

Under section 10 of the Act, an arbitrator may be challenged because of lack of impartiality, and under section 17 if he has delayed the proceedings. As mentioned *supra*, section 8 of the Act enumerates in a non-exhaustive way a number of cases, where such circumstances which may diminish the confidence in an arbitrator's impartiality are deemed to exist.

Under section 17 of the Act, a challenge to an arbitrator may take place at either party's request, if the arbitrator has delayed the proceedings. This is a sanction arising from the duty prescribed in section 21 of the Act, to the effect that the arbitrators shall handle the dispute in an impartial, practical and speedy manner. It is not stated explicitly, but the delay referred to in section 17 must be material or occur repeatedly.

Section 10 of the Act provides that a challenge to an arbitrator based on lack of impartiality must be presented within 15 days from the date on which the party bringing the motion became aware both of the appointment of the arbitrator and of the existence of the circumstance allegedly causing his lack of impartiality. This means that no time limit begins to run until *after* appointment of the arbitrator. If a party is aware of a reason for challenging an arbitrator prior to his appointment, that party must submit the challenge within 15 days from the appointment. If the party becomes aware of the ground for challenge only after the appointment, the 15 day period starts to run from the date when it became aware thereof.

If a challenge is presented, it will be decided by the (other) arbitrators unless the parties have agreed otherwise. If the arbitrators grant the challenge, their decision is final and cannot be appealed to the ordinary courts. If the arbitrators do *not* grant the challenge, section 10 distinguishes between cases where the ground for refusal is that the challenge was filed too late, and other cases. If it was filed too late, the decision may be appealed to the district court within 30 days. No mention is made in the Act of the other cases. In all likelihood, this means that the decision of the district court is final.

As mentioned *supra*, the parties may agree that decisions regarding challenges to arbitrators be decided by someone other than the arbitrators, *e.g.* by an arbitration institution. In that case, the decision of such institution will be final and cannot be appealed or otherwise brought before the ordinary courts.

Pursuant to section 10 of the Act, the fact that a decision with respect to a challenge is appealed to the district court does not necessarily mean that the arbitration proceedings must be stayed. It is in the discretion of the arbitrators to decide whether to stay the proceedings or not; they may even render an award, while court proceedings are pending.

Where removal is sought on the basis of section 17 of the Act, because an arbitrator is delaying the proceedings, the decision is taken by the district court without appeal to a higher court. If the court or institution removes the arbitrator, it is to appoint another arbitrator.

In other cases, where an arbitrator resigns or is removed, and where the parties have not provided otherwise, section 16 of the Act provides that a new arbitrator shall, at the request of a party, be appointed by the district court. If, on the other hand, the arbitrator is prevented from fulfilling his duties as an arbitrator, due to circumstances which arose subsequent to his appointment, the person, who originally had the right to appoint an arbitrator must also make the new appointment. The rules regulating the original appointment also apply to this appointment.

The SCC Rules also contain provisions on the disqualification of arbitrators.

Article 18 of the SCC Rules stipulates that where a party wishes to challenge an arbitrator for lack of impartiality, he must submit the challenge to the SCC Institute in writing and give reasons for the challenge. Such submission must be made within 15 days from the date when the party became aware of the circumstances on which the challenge is based. When the SCC Institute receives a challenge, it must give the parties and the arbitrators an opportunity to comment on the challenge. Thereafter, the SCC Institute decides the matter, and, if it finds the challenge justified, removes the arbitrator. This decision is not subject to appeal.

The SCC Institute may, however, also remove an arbitrator without a challenge, *i.e.* on the basis of article 19 of the SCC Rules, if the arbitrator becomes unable to fulfil his function, or the SCC Institute finds that he does not fulfil his duties. Before doing so the SCC Institute must give the parties and the arbitrators an opportunity to express their views.

When an arbitrator resigns or is removed, the SCC Institute appoints another arbitrator. This applies regardless of who originally appointed the arbitrator, who has resigned or who has been removed. If he was appointed by a party, that party must be given an opportunity to present its comments. If the arbitral tribunal consists of three or more arbitrators, the SCC Institute may, after having heard the parties and the arbitrators, decide not to appoint a replacement, but leave it to the remaining arbitrators to continue the proceedings, thus concluding the arbitration with only two arbitrators. In practice, however, this situation occurs very rarely.

Should an arbitrator die in office, the party who appointed him must appoint a new arbitrator, or the SCC Institute, if the arbitrator had been appointed by it in the first place.

### *(d) Compensation of Arbitrators*

Pursuant to section 37 of the Act, the arbitrators are entitled to reasonable compensation for their work and for expenses incurred. It is important to note that the parties are jointly and severally liable for payment of the compensation to the arbitrators. However, if the arbitrators find that they do not have jurisdiction to try a case, the party objecting to their jurisdiction is liable for the compensation to the arbitrators only in exceptional circumstances. Reasonable compensation must be determined in relation to the time spent on the case, the complexity of the case, and other relevant circumstances.

The arbitrators may agree with the parties on their compensation, but only with both parties together. An agreement with only one party is void pursuant to section 39, paragraph 2, of the Act.

Section 40 of the Act reiterates a traditional rule of Swedish arbitration law expressed also in the old Act, *i.e.* that the arbitrators may not withhold the award to obtain payment for their costs or fees. However, section 38 provides that the arbitrators may request security for their costs and fees. Interest on the security is included therein. The arbitrators may fix separate security amounts for certain claims, *e.g.* for counterclaims or claims presented at a later stage of the

proceedings. If a party does not pay his share of the requested security amount, the other party may provide it. If the requested security amount is not provided by either party, the arbitrators may terminate the proceedings, in whole or in part. The arbitrators may, during the proceedings, draw on the security amount to cover their *expenses*, but may not, without the consent of the parties or, where one party has put up all the security amount, that party, pay themselves from the security amount for *work* done. When an award has been rendered and has become enforceable with respect to the arbitrators' compensation, they may draw on the security amount to obtain payment.

Section 37 of the Act stipulates that in the award the arbitrators must determine the compensation, which is payable to them, separately for each of them. Pursuant to section 41 of the Act, the arbitrators must also include in the award clear instructions to the parties as to the procedure to be followed, if they or one of them wishes to appeal the decision included in the award relating to the compensation to be paid to the arbitrators. Such action must be brought in the district court within three months from the date when the party received the award, or from the date when any correction, supplement or interpretation thereof was made. If the compensation is reduced by the court as a result of an action brought by one party, it follows from section 41, paragraph 2, that the reduction applies also to any compensation payable by the other party.

When submitting a request for arbitration to the SCC Institute, the claimant must pay an administrative fee of EUR1,000, pursuant to article 6 of the SCC Rules. The SCC Institute will also determine a so-called 'advance on costs' to cover the total costs, fees and the administrative expenses of the arbitrators and any experts of the tribunal as stipulated in article 39. If the advance on costs is not paid either in half by each party, or in total by one party, the case is dismissed. Only when payment has been made is the case referred to the arbitrators.

According to article 39 of the SCC Rules, the arbitration costs consist of the fee of the arbitrators, the administrative fee of the SCC Institute, compensation due to the arbitrators and to the SCC Institute to cover expenses during the proceedings and the fees and expenses of any expert appointed by the arbitral tribunal.

The advance on costs determined at the outset of the proceedings should, as a rule, correspond to the final arbitration costs, unless, *e.g.* the amount in dispute is adjusted in the course of the proceedings, or the dispute is settled. The parties can, however, generally expect that the advance on costs determined at the outset will cover the entire arbitration costs.

However, the SCC Institute may increase the advance on costs, *e.g.* in the case of submission of a new claim. The advance on costs is usually not reduced, unless exceptional circumstances so warrant.

The advance on costs is thus to cover the estimated arbitration costs. The advance on costs is based on the Regulations for Arbitration Costs included in the SCC Rules. The amounts stated in the Regulations are related to the amount in dispute. For the purpose of calculating the amount in dispute, the value of any counterclaim or set-off claim is to be added to the amount of the claim. Interest claims are not included. The fees are calculated for the chairman of the tribunal or

for a sole arbitrator, and the fee due to co-arbitrators is fixed at 60 per cent of the total fee paid to the chairman. The amounts in dispute are arranged at different levels with a minimum and maximum fee for each level, thus providing a certain amount of flexibility.

In addition, the SCC Institute may, if it finds that a case requires substantially more or less work than normally anticipated, deviate from the fee schedule in the Regulations.

Where the amount in dispute is not specified, *e.g.* if only declatory relief is sought, the SCC Institute will determine the advance on costs on the basis of an estimated value of the case. In determining such value, the SCC Institute will, *inter alia,* take into account the subject matter of the dispute, the parties' positions, the number of parties, and procedural aspects of the case, including the expected length of the proceedings.

As stated *supra,* the advance on costs is adjusted only exceptionally. The SCC Institute takes the decisions regarding adjustments. However, the initiative to adjust the advance on costs would usually be taken by the arbitral tribunal which should inform the SCC Institute of the reasons for such adjustment.

The SCC Institute determines the fees of the arbitrators and the fee of the SCC Institute in accordance with the Regulations for Arbitration Costs. As a rule, the fees will be equivalent to the amounts stated in the decision on advance on costs, unless, *e.g.* the dispute has been settled in the course of the proceedings in which case the fees would generally be reduced.

Before making the award, or closing the case for other reasons, the arbitral tribunal would usually ask the SCC Institute to determine the arbitration costs. At the same time, the arbitral tribunal should inform the SCC Institute if the fee of the co-arbitrators deviates from the fee schedule in the Regulations.

## IV. THE PROCEDURE

### *(a) General*

As indicated *supra,* neither the Act nor the SCC Rules introduce radical, or even significant, changes with respect to the procedure in Swedish arbitrations. The proceedings will continue to be speedy, efficient and impartial while at the same time safeguarding due process. These are characteristics which have become the hallmark of arbitrations conducted in Sweden.

Both the Act and the SCC Rules do, however, contain a number of new provisions which are both interesting and important.

### *(b) Request for Arbitration*

The first such provision is section 19 of the Act, which regulates the request for arbitration. This provision stipulates that the request for arbitration be in writing. This is a new provision which did not exist in the old Act. In practice, however,

also prior to the Act, the overwhelming majority of requests for arbitration have been in writing. It should be noted that it is not required of the claimant to specify in detail the relief sought, nor all the circumstances on which the claim is based. It is sufficient for the claimant to express a request that the dispute in question be resolved by arbitration and in general to set out the issues which are to be decided by the arbitrators. As a result of the provisions in section 19 the arbitrators and the respondent will from the outset of the proceedings be informed of the issues to be decided. Only at a later stage of the proceedings will the claimant be asked to submit specific and exact prayers for relief. This is an important aspect, since in Swedish arbitration proceedings an arbitrator may not grant a different or more extensive relief than has been properly demanded by a party; he cannot act *ultra petita*.

A new provision with respect to the request for arbitration is that the claimant must appoint its arbitrator when filing the request for arbitration, assuming that the tribunal is to be composed of three arbitrators pursuant to the agreement of the parties. Under the old Act each party had 14 days to communicate to the other party its choice of arbitrator. If an arbitrator is not appointed in the request for arbitration, the request has not been validly made. One consequence of this may be of significant practical and legal importance, *i.e.* that the request for arbitration will not prevent the statute of limitations from running. In situations where the parties have not agreed on the number of arbitrators, the claimant is not required to appoint its arbitrator when submitting its request for arbitration.

The SCC Rules, article 5, contain provisions with respect to the request for arbitration, including provisions on registration fees, dismissal of the request and the date of commencement of the arbitration. The Rules are more detailed than the relevant sections of the Act.

Article 5 of the SCC Rules requires the claimant to include in its request for arbitration the following:

(1) a statement of the names, addresses, telephone and fax numbers and e-mail addresses of the parties and their counsel;
(2) a summary of the nature of the dispute;
(3) a preliminary statement of the relief sought by the claimant;
(4) a copy of the arbitration agreement or clause under which the dispute is to be settled; and
(5) if applicable a statement identifying the arbitrator appointed by the claimant including the arbitrator's address, telephone and fax numbers and e-mail address.

One aspect of the arbitral procedure which sometimes creates problems from a practical point of view is that of notification of the parties, both of the request for arbitration and replies thereto, as well as of subsequent briefs submitted in the arbitration. In this respect the SCC Rules, in particular article 12, offer considerable flexibility. The notification may be delivered by courier or registered mail, fax, e-mail or any other method for which a written record is available. A notification is deemed to have been received, at the latest, on the

date it would normally have been received, given the chosen means of communication.

### *(c) Place of Arbitration*

It follows from section 22 of the Act, that it is for the parties to determine the place of arbitration. They may do so directly, or indirectly by reference to arbitration rules administered by a certain arbitral institution. When the parties have failed to do so, the place of arbitration is to be determined by the arbitrators. If the place of arbitration is Sweden, hearings may nevertheless be held abroad, unless otherwise agreed by the parties. The place of arbitration is much more than simply a question of geography. The place of arbitration has important legal consequences, since in the absence of an agreement between the parties the procedural rules will be based on the arbitration law of the place of arbitration.

As mentioned *supra*, the tribunal may hold hearings and meetings outside the place of arbitration, including outside Sweden. This may be appropriate in circumstances where witnesses cannot travel to the place of arbitration, or if there is a need for site inspections. In some cases it may be necessary to have hearings and meetings in several countries outside the agreed place of arbitration. The place of arbitration must be stated in the award. When the award is said to be given at a certain place, such place will be deemed to be the place of arbitration.

### *(d) New Claims and Counterclaims*

Article 23 of the Act stipulates that within the period of time determined by the arbitrators the claimant is to state its claims (prayers for relief) in respect of the issue described in the request for arbitration as well as the circumstances relied on by the claimant in support thereof. Thereafter, again within the period of time determined by the arbitrators, the respondent is to state its position in relation to the claims and describe the circumstances relied upon by it in support of its position. Section 23 thus provides that it is for the tribunal to determine the time within which the claimant shall state its claims in respect of the issues described in the process for arbitration. The claimant thus has a duty but also a right to present its prayers for relief and the circumstances invoked by the claimant in support thereof. If the claimant fails to do so within the time period determined by the tribunal, the claimant may be precluded from presenting its case. It should be noted, however, that pursuant to paragraph 2 of section 23, the claimant may submit new claims and amend its claims subject to certain conditions. The respondent has the same rights and obligations as the claimant in this respect.

First, new or amended claims, as well as counterclaims, must be covered by the arbitration agreement. Should one of the parties present a new claim which is not covered by the arbitration agreement and if the other party fails to object, the other party may be deemed to have waived its right to object. In this way a claim which is not covered by the arbitration agreement may nevertheless be dealt with by the arbitrators and decided in the award. Another condition is that the arbitrators do not consider it inappropriate to rule on the new or amended claim taking into

consideration the time at which the claims are submitted and other circumstances. The later a new or amended claim is presented the more likely it is that the arbitrators will reject it. It should be noted that under the Act the arbitrators are expected to take a generous attitude towards such claims as long as they are covered by the arbitration agreement. Ultimately, however, it is in the discretion of the arbitrators to accept or to reject new or amended claims.

### *(e) Due Process*

Section 21 of the Act stipulates that the arbitrators must handle the dispute in an impartial, practical and speedy manner. They must also act in accordance with the decisions of the parties in so far as there is no impediment to do so. Section 21 of the Act thus repeats one of the main principles long enshrined in Swedish arbitration law. In administering the case, the arbitrators are bound to comply with the stipulations of the Act as regards the procedure, but primarily with the wishes and agreements of the parties. The parties may thus agree on a particular procedure to be followed by the tribunal. As the language of section 21 indicates, however, there are certain limits to the arbitrators' duty to comply with the procedural agreements of the parties. Generally speaking, however, arbitrators are free to disregard the agreement of the parties only in extraordinary situations; *e.g.* if the procedural rules agreed to by the parties would involve or entail illegal or improper conduct, the arbitrators would not have a duty to follow such instructions from the parties.

It should be noted that a party which is dissatisfied with the procedure as applied by the tribunal cannot turn to a court of law and request that the court intervene in the arbitration, or to order the tribunal to undertake certain acts or refrain from taking certain acts. The Act does not contain any provision empowering courts to intervene in an arbitration.

With respect to rules governing the procedure before the tribunal, the SCC Rules set out supplementary provisions. According to the Rules, for example, the tribunal may decide that the chairman alone is entitled to make procedural rulings. This is often a very practical approach when it comes to the management of the case. It should be noted, however, that unless the parties have provided for this possibility most procedural decisions must be taken by the tribunal as a whole.

Section 24 of the Act stipulates that arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases in writing or orally. If requested by a party, and provided that the parties have not otherwise agreed, an oral hearing will be held prior to the determination of an issue referred to the arbitrators.

The arbitrators' duty to afford each party sufficient opportunity to present its case is the same as provided for in the old Act. This principle embodies a right for each party to have an opportunity to respond to the arguments of the other party. Section 24, paragraph 1, makes it clear, however, that this right is not an unfettered right; it is limited by the words 'to the extent necessary'. This is an important limitation enabling the arbitrators to prevent obstructions or delays by a party. No

party has an absolute right to introduce material which in the arbitrators' view is not required for the determination of the claim.

The parties may agree that no oral hearing shall be held. The arbitrators are bound by such an agreement. However, a party can never agree in advance to waive its right to present its case to the extent necessary.

The second paragraph of section 24 stipulates that a party shall be given an opportunity to review all documents and all other materials pertaining to the dispute which are supplied to the arbitrators by the other party or another person. It reflects a minimum standard which is normally met by a party sending the documents concerning the dispute to the other party. An obligation to make available documents to the other party does not necessarily mean, however, that the other party must always be afforded a time within which to comment on the documents.

For the avoidance of doubt, it should be pointed out that the arbitral tribunal is under no duty to make available to the parties its own notes, minutes or other documents prepared by it for the purpose of its own deliberations.

Where one of the parties, without valid cause, fails to appear at a hearing or otherwise fails to comply with an order of the arbitrators, such failure does not prevent the proceedings from continuing, nor the resolution of the dispute on the basis of the existing materials. This provision, set out in the third paragraph of section 24, is important for an efficient procedure. It also makes it clear that the arbitrators are not allowed to make an award by default; they must always determine the dispute on the basis of the existing materials before them.

### *(f) Evidence*

Article 25 of the Act stipulates that it is for the parties to supply and present the evidence. This has been the practice in Swedish arbitrations since the introduction of the Procedural Code in 1948. Since the old 1929 Arbitration Act antedated the Procedural Code, the rules and principles laid down in the Procedural Code, and now in the Act, were not reflected in the old Act. Although the arbitrators may advise a party that it has the burden of proof with respect to a certain fact, it is always for that party to decide what evidence to produce. The arbitrators will not give any instructions to the parties in this respect. The arbitrators may at their own initiative, however, appoint experts unless *both* parties object thereto. In practice it would seem that most arbitrators are reluctant to appoint an expert unless both parties agree.

It is for the parties to call witnesses and to ensure that they are present at the hearing. Should a witness not appear the party is nevertheless not deemed to have waived its right for that witness to be called. It is for the arbitrators to decide how and when the witness can be heard.

Article 25 further stipulates that the arbitrators may refuse to allow evidence where such evidence is manifestly irrelevant to the case or where such refusal is justified having regard to the time at which the evidence is presented. This principle is inherited from the old Act. It is an important feature of Swedish

arbitral proceedings and is in keeping with the overall duty of the arbitrators to manage the case in the most efficient manner.

The arbitrators may not administer oaths, nor may they impose conditional fines or otherwise use compulsory measures in order to obtain evidence. The Act does not modify the old Act with respect to the administering of oaths. The Swedish Government was not prepared to grant the arbitrators such wide-ranging powers, although they exist in some other legal systems.

The SCC Rules closely follow the Act as regards the presentation of evidence. Article 26 of the SCC Rules reflects a well established rule in Swedish court proceedings that a party must specify what it intends to prove with each piece of evidence. This is usually done in a so-called 'statement of evidence'. It is not enough merely to submit bundles of documents; the party must be precise as to what each document is intended to prove. With respect to the hearing of witnesses, it should be noted that unlike the approach in many common law countries, witnesses in Swedish arbitrations are not expected to develop the facts of the case. This is the role of the parties and their counsel. The hearing of witnesses in the Swedish tradition is limited to contested issues of facts.

As a rule, witnesses are not allowed to attend the hearing before testifying. Witnesses are normally examined by the parties or their representatives, rather than the arbitrator, in the manner used in common law jurisdictions, *i.e.* by direct examination, cross-examination and re-examination. Another important feature of the Swedish approach is that the witness is both permitted and expected to relate his entire story at once, without interruption and without being prompted by direct questions from either counsel or arbitrators. The witness would thus normally start by giving a narrative statement of what he knows or has seen or heard, before he is subjected to direct questions and cross-examination.

There are very few rules of evidence in the Swedish procedural and arbitration law. There is, *e.g.* no prohibition against hearsay. The arbitrators may freely evaluate witness testimony as well as any other evidence. In fact, arbitrators may evaluate almost everything - including any occurence during the proceedings - but are expected to identify and explain in the award the factors which have been relevant for the arbitrators when reaching their conclusions.

Where a party wishes a witness, an expert, or a party to testify under oath, that party may, after obtaining the consent of the arbitrators, submit an application to such effect to the district court. This also applies if a party wishes the other party, or other person to be ordered to produce written or physical evidence. If the arbitrators find that the measure is justified, having regard to the evidence in the case, they are to grant the request. Where the measure may lawfully be taken, the district court will grant the application. The provisions of the Swedish Procedural Code apply with respect to such measures. The arbitrators will be called to the hearing and given the opportunity to ask questions. If the arbitrators are absent, the hearing may nevertheless proceed.

The arbitrators must determine whether in their opinion the measure is justified. They may reject the request if they consider that the evidence already presented to them is sufficient. They may also refuse approval if they think that the

costs involved would be exorbitant, or that the application is made solely for some extraneous reason, such as a desire to obtain publicity.

In international arbitration, however, it is likely that the witnesses will not be resident in Sweden and thus not subject to a Swedish district court's jurisdiction. Foreign courts may assist in obtaining evidence from such witnesses. The extent to which this can be done will, however, depend on international conventions or local law.

As will be discussed *infra*, it may be of critical importance for a party to protest against procedural irregularities. This aspect is addressed in article 29 of the SCC Rules. This provision stipulates that, if, during the proceedings, a party fails promptly to state an objection to any deviation from the provisions of the arbitration agreement, the SCC Rules or other rules which are applicable to the proceedings, it shall be deemed to have irrevocably waived the right to object.

### *(g) Interim Security Measures*

Finally, mention must be made of section 25, paragraph 4, of the Act which introduces the possibility for arbitrators to order interim security measures, at the request of a party, unless the parties have agreed otherwise. Article 31 of the SCC Rules sets out similar provisions. It should be noted that both the Act and the Rules stipulate that the arbitrators may order the requesting party to provide reasonable security for damage which may be incurred by the other party as a result of the measure in question. Although both provisions constitute welcome clarifications of Swedish arbitration law, it must be remembered that any decision by a tribunal on interim security measures - whether styled 'award' or 'order' - would not be enforceable in Swedish courts. The extent to which they might be enforceable by courts in other countries is, of course, a decision to be taken by such courts.

## V. THE AWARD

The Act sets out relatively detailed provisions relating to the arbitral award. They are to be found in sections 27 to 32 of the Act. Before these provisions are addressed, it is proposed briefly to discuss the law and/or rules which are applied to resolve a dispute on the merits.

### *(a) Applicable Law*

Just as in the old Act, the Act does not have any provision on the rules applicable to the substance of a dispute. The generally held opinion is that, unless the parties have agreed otherwise, the arbitrators are to base their decision on the applicable law. Moreover, the arbitrators must apply such law and/or rules as have been chosen by the parties. Thus, party autonomy reigns supreme. True there are certain - but generally speaking very limited - exceptions from this fundamental

principle of international commercial arbitration. Arbitrators may also decide cases *ex aequo et bono* or as *amiables compositeurs*, but only if the parties have expressly authorised them to do so.

The first question to be addressed by an arbitral tribunal is that of which conflict of laws system to apply. If the parties have agreed on a conflict of laws system, it is clear that the arbitrators must follow such instructions of the parties. If no agreement has been reached by the parties, however, the tribunal may in all likelihood in its discretion decide which conflict of laws system to apply. Swedish law does *not* stipulate that arbitrators sitting in Sweden must apply Swedish conflict of laws rules. On the other hand, if the parties have agreed in the arbitration clause on Sweden as the place of arbitration, it will often be presumed that such choice also includes the Swedish conflict of laws rules.

In contrast to the Act, the SCC Rules have provisions on rules applicable to the substance of the dispute. Paragraph 1 of article 24 provides that the arbitral tribunal shall decide the dispute in accordance with the law or rules of law agreed by the parties. In the absence of such an agreement, the arbitral tribunal shall apply the law or rules of law which it considers to be most appropriate. It is not necessary for the tribunal first to identify which conflict of laws rules to apply, but they may apply substantive law, or rules of law, directly. In many situations this will in all likelihood facilitate the decision-making of the arbitrators, with respect to applicable law. Paragraph 2 provides that any reference to the law of a given State shall be construed as directly referring to the substantive law of that State and not to its conflict of laws rules. Paragraph 3 provides that the arbitral tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised it to do so.

### *(b) Awards and Decisions*

Section 27 of the Act is new and defines, for the first time in statutory language, the concepts of *award* and *decision*. The provision also regulates when a determination by the arbitrators should take one form or the other. In the first paragraph it is stipulated that the issues referred to the arbitrators shall be decided in an *award* and that, if the arbitrators terminate the arbitral proceedings without deciding such issues, such decision is also an award. Other decisions, which are not awards, are defined as 'decisions'. This means, *inter alia*, that if the parties have not referred the issue of the validity and applicability of the arbitration agreement to the tribunal, a ruling by the tribunal on its own competence takes the form of a 'decision', if the tribunal finds that it has jurisdiction to decide the dispute referred to it. If the tribunal, however, finds that it does not have jurisdiction to decide the dispute referred to it, the arbitral proceedings are terminated through an 'award'. This means that a determination of the tribunal that it lacks jurisdiction to decide the issue referred to it becomes *res judicata*, unless it is appealed to the district court. That such appeal is possible follows from section 36 of the Act.

The 1958 New York Convention on the Recognition and Enforcement of

Foreign Arbitral Awards covers only arbitral *awards*, but not other decisions of an arbitral tribunal. The concept 'arbitral award' is, however, not defined in the Convention. It is thus possible that a determination by which a tribunal terminates the arbitral proceedings without deciding the issues and which according to the Act is an 'arbitral award' - at least in some cases - may not fall under the Convention.

The Swedish Procedural Code provides that the respondent has the right to insist on a judgment even if the plaintiff withdraws its action and the withdrawal occurs only after the defence has been filed. Under the old Act it was unclear whether the respondent in an arbitration had a similar right to have the dispute resolved in the event the claimant withdrew its claim.

Article 28 now introduces such a right for the respondent in an arbitration. The provision applies irrespective of whether a claim is withdrawn before or after a statement of defence has been submitted. If a party requests that the tribunal rule on a claim which has been withdrawn, the tribunal has no discretion in this respect but must rule on the claim.

The same rule is included in article 35, paragraph 1, of the SCC Rules. Paragraph 2 of the same article provides that if a party who has not yet paid an advance on costs, requests the arbitral tribunal to rule on a withdrawn claim, the Institute may, as a condition for such ruling, order the requesting party to pay an advance on costs.

Section 29 of the Act gives arbitrators significant discretion in rendering *separate awards*. It stipulates that arbitrators may, unless objections are raised by *both* parties, decide part of the dispute in a separate award. It is important to note, however, that a claim relied on as a set-off claim must be ruled on in the same award as the main claim. If a party has admitted a claim, wholly or partially, a partial award may be rendered with respect to that which has been admitted.

Section 29, paragraph 1, further provides that a specific issue, which is of importance to the resolution of the dispute, may be decided in a separate award. Such a separate award may determine liability, but leave the quantum of damages for later determination. Also in cases where the claimant bases his claim on alternative grounds, it is possible under section 29 for the arbitral tribunal to rule on one of the grounds in a separate award.

The SCC Rules also provide for separate awards. According to article 34 of the Rules, a separate issue or a part of the matter in dispute may be decided in a separate award. Also where a party has partially admitted a claim, the tribunal may render a separate award based on such admission. The Rules do not, however, provide that a claim invoked as a defence by way of set-off must be adjudicated in the same award as the main claim.

### *(c) Award Period and Voting*

According to section 18 of the old Act, a six month time period applied for making an award in cases where both parties were Swedish residents. This time limit did not, however, apply to non-Swedish parties. There is no time limit at all in the Act. The parties are of course free to agree on an award period themselves, if

they deem it appropriate, but if they fail to do so no statutory time limit will apply. If the parties have agreed on an award period, *they* must also agree on an extension of that limit, if necessary, since an award made after the expiration of the award period may later be set aside.

Under article 33 of the SCC Rules, an award must be rendered no later than six months from the date when the case was transferred to the tribunal. The Institute may extend this period of time. The extension can be granted by the SCC Institute not only at the request of the arbitral tribunal, but also at the request of a party. The wording of article 33 does indeed suggest that the Institute may extend the award period at its own initiative.

Section 30, paragraph 2, of the Act provides that unless the parties have decided otherwise, the opinion of the majority of the arbitrators participating in the determination shall prevail. If no majority is attained for any opinion, the opinion of the chairman shall prevail. The same rule is included in article 30 of the SCC Rules.

The first paragraph of section 30 sets out a new important rule which prevents an arbitrator from obstructing the proceedings by failing to attend deliberations of the tribunal. The provision stipulates that where an arbitrator fails, without valid cause, to participate in the determination of an issue by the arbitral tribunal, such failure will not prevent the other arbitrators from ruling on the matter. The same rule is included in article 32, paragraph 2, of the SCC Rules.

### *(d) Rendering the Award*

The rendering of an award is important in several respects. With respect to time, the award must be given within the period of time (if any) stipulated by the parties. The three month period within which an arbitrator may bring a court action against the award regarding his fee is calculated from the time the award is rendered pursuant to section 41, paragraph 1, of the Act.

The place at which the award is rendered is also important. It determines which Court of Appeal has jurisdiction over actions to declare an award invalid, or to have it set aside, as stipulated in section 43, paragraph 1, of the Act. It also determines which district court has jurisdiction over actions concerning the arbitrators' fees.

The award must be delivered to the parties immediately. This follows from section 31, paragraph 3, of the Act. If the award contains an order to compensate the arbitrators, the arbitrators have an interest in communicating a copy of the award to each party as quickly as possible. Otherwise, the three month period within which a party may bring an action challenging the arbitrators' fees will not start to run. It may also be in the interest of the winning party to have the award communicated to the other party as quickly as possible, so that the three month period for bringing an action to have the award set aside starts to run.

There is, however, no statutory requirement as to the *manner* in which the award is to be communicated to the parties. The award needs merely be sent by ordinary mail to the parties. The duties of the arbitrators may, however, be

discharged in a convenient manner by sending each of the parties a signed copy of the award by registered mail.

Swedish law does not require the award to be filed or registered with any court or authority. This is not even possible under Swedish law. Article 38 of the SCC Rules provides, however, that a tribunal shall, after the close of the proceedings, submit to the Institute a copy of every award and written decision issued in the case, as well as of all recorded minutes relating thereto. Such documents are kept on file by the SCC Institute.

### *(e) Correction and Interpretation of Awards*

Just as in the old Act, the Act is silent as to the finality of arbitral awards. It is clear, however, that an arbitral award on the merits is final and binding and constitutes *res judicata* as of the time that it is rendered. In addition, a final award renders the arbitrators *functus officio*. Consequently, as of the moment that the award is rendered, the arbitrators no longer have jurisdiction over the dispute. Section 27, paragraph 4, of the Act, explicitly states that the mandate of the arbitrators is completed when they have rendered a final award. The arbitrators do, however, retain jurisdiction to correct and interpret awards.

Section 32 of the Act, which is a new provision, sets out rules on the correction of awards to the effect that if the arbitrators find that an award contains an obvious error as a result of typographical, computational or other similar mistake by the arbitrators or another person, or if the arbitrators have failed to decide an issue which should have been dealt with in the award, the arbitrators may within 30 days of the date when the award was rendered, decide to correct or supplement the award. They may also correct or supplement an award or interpret the operative part of the award, where any party so requests within 30 days of the receipt of the award by that party. Such time limits cannot be extended.

Where, upon request by any of the parties, the arbitrators decide to correct, or interpret the operative part of an award, this must be done within 30 days from the date of the receipt by the arbitrators of the request. Where the arbitrators decide to supplement the award, this must be done within 60 days. The time limits cannot be extended.

Before the arbitral tribunal takes any decision referred to *supra*, the parties should be given an opportunity to express their views with respect to the contemplated measure.

Article 37 of the SCC Rules sets out similar rules on the correction of an award and on additional awards. The said article provides that any obvious miscalculation or clerical error in an award or decision shall be corrected by the tribunal. Within 30 days of receiving the award the tribunal shall, if a party so requests, decide a question which should have been decided in the award, but which was not decided therein. The article further stipulates that within 30 days of receiving the award, the tribunal may, if a party so requests, provide an interpretation thereof in writing. The Rules thus seem to go further than the Act since the right of the tribunal to provide an interpretation of an award is not explicitly limited to the operative part

of the award. Finally, the said article provides that the arbitral tribunal *shall*, before it takes any action referred to *supra*, give the parties an opportunity to express their views with respect to the measure.

## VI. FINALITY AND ENFORCEABILITY OF ARBITRAL AWARDS

One of the undisputed advantages of arbitration is that an arbitral award, in most legal systems, is final and binding when rendered. This means that an award is final and binding on the merits, *i.e.* it cannot be appealed or retried on the merits. On the other hand, most legal systems have rules allowing for the setting aside of arbitral awards on certain narrowly defined procedural grounds. The efficiency and attraction of a country as a place for arbitration depends to a large extent on how restrictive its legislation is in this respect. Generally speaking, Swedish courts have traditionally been reluctant to set aside arbitral awards.

One of the cornerstones of modern arbitration, therefore, is the finality of the arbitral award. Another fundamental aspect - and often closely related to finality - is the enforceability of arbitral awards. At the international level, much has been achieved by the widespread acceptance of the 1958 New York Convention. Most important trading nations today, including Sweden, have acceded to the Convention. The rules and principles laid down in the New York Convention do however, leave room for significant differences in the enforcement procedures of different countries. Enforcement rules in national law do therefore continue to play an important role in international commercial arbitration.

### *(a) Finality of Arbitral Awards*

#### *(i) Introduction*

The old Act made a distinction between invalid and challengeable awards. The first category includes awards which were invalid *per se* and which did not require any activity from any of the parties; if the award was invalid it was so *ab initio* and forever. The second category, challengeable awards, covers awards which could be set aside by a court of law at the request of a party under certain circumstances. The party had to make its request within a stipulated period of time.

In the Bill leading to the adoption of the Act, the distinction between invalid and challengeable awards was discussed. This discussion was primarily prompted by the fact that the UNCITRAL Model Law, and a number of Arbitration Acts in other jurisdictions, do not make such a distinction. In the Model Law, for example, there are provisions only with respect to awards which may be challenged. It was discussed whether or not it was necessary, or desirable, to maintain this distinction in Swedish law, or if only provisions with respect to challengeable awards should be included, in line with the approach of the Model

Law. During this discussion it was emphasised that awards should be considered *invalid* only where a third party was involved, or where there was an element of public interest, whereas awards should be considered *challengeable* where only the interests of the parties to the dispute in question were involved. It was suggested that the distinction between invalid and challengeable awards be preserved, primarily with a view to *emphasising* the difference between these two different categories of interest. It was suggested that the best and clearest way to emphasise this difference would be to group all circumstances which might lead to the invalidity of an award under one provision, while all circumstances which could lead to the setting aside of an award would be addressed in another, separate, provision. This is why the Act maintains the distinction between invalid awards on the one hand and challengeable awards on the other hand.

Section 33 of the Act deals with invalid awards and section 34 with challengeable awards. These two sections will be discussed *infra*. The Act introduces two new provisions which are of importance in the present context, *i.e.* section 51, which deals with so-called 'exclusion agreements' and section 35 which makes it possible, under certain circumstances, for a court of law to remit a case to the arbitral tribunal with a view to remedying procedural defects which would otherwise lead to the setting aside of an award. These two new provisions will also be discussed *infra*.

*(ii) Invalid awards*

Section 33 of the Act sets out three grounds for the invalidity of an arbitral award. These grounds are:

(a) the arbitral award decides an issue which is non-arbitrable;
(b) the award or the manner in which the award has been rendered violates Swedish public policy; and
(c) the award has not been made in writing and it has not been signed by the arbitrators.

It should be noted at the outset that these three grounds are the *only* grounds on which an arbitral award may be rendered invalid. The list of grounds in section 33 is thus exhaustive. If any of these grounds exist, the award is simply invalid *ab initio* and forever. A party need not take any judicial action to render it so. As a practical matter, however, the declaration by a Swedish court of law that an award is invalid would typically facilitate raising defences against the enforcement of an award in other countries, particularly in countries which are signatories to the New York Convention. There is no time limit for a claim to have an award declared invalid; this is logical, since if an award is invalid, it is invalid forever.

As far as the first ground, non-arbitrability, is concerned, it must be emphasised that the Act itself does not contain any exhaustive definition of arbitrability. The only explanation of the concept is found in section 1 of the Act, which, as discussed *supra*, sets out the formula generally used under Swedish law, *i.e.* that an arbitrable dispute is a dispute which the parties may resolve by entering into a settlement agreement. As a matter of practice, however, this general definition is quite helpful

in determining whether or not a particular dispute is arbitrable under Swedish law. Nevertheless, there are a number of situations where it is not possible to make this decision on the basis of the general formula. The answer will then have to be sought in the statutes which regulate the subject matter of the dispute in question. One issue, which has been discussed from time to time is whether or not patent disputes are arbitrable. The answer to this question is to be found in Swedish patent legislation, from which one concludes that disputes concerning the *validity* of patents are not arbitrable. Another question which has been the subject of debate is whether or not competition law disputes are arbitrable. As mentioned *supra*, this issue has been expressly addressed in section 1 of the Act, which stipulates that the civil law consequences, as between the parties, of competition law disputes may be submitted to arbitration, but not issues of competition law which may contain an element of public interest.

The second invalidity ground mentioned in section 33, violation of public policy, is new. Needless to say, public policy may play an important role with respect to the recognition and enforcement of foreign arbitral awards, where violation of public policy is one ground for refusing recognition and enforcement. The concept of public policy is a novelty, however, in so far as it relates to Swedish arbitral awards, *i.e.* arbitral awards rendered in Sweden. The provisions of section 33 were inspired by the Model Law. As a result of the introduction of this particular ground of invalidity, it was said in the *travaux préparatoires* that the grounds in section 33 are *exhaustive*. It goes without saying that it is difficult, if not impossible, to enumerate with any precision the circumstances which may constitute a violation of public policy. It will be for the courts to establish the parameters for this particular ground of invalidity. At this stage, however, it is possible to select a number of situations which, in all likelihood, violate Swedish policy. For example, if parties try to enforce, in arbitration, claims based on criminal acts, such as an obligation to pay a bribe, an arbitral award ordering such payment is likely to be deemed to violate Swedish public policy. Another rather obvious candidate would be an arbitral award which has been produced as a result of criminal acts, *e.g.* as a result of threats against arbitrators or the bribing of arbitrators. There is, however, a third category of situations which is more problematic in this respect, *i.e.* that the very concept of public policy, to a certain limited extent, opens the door to a review of the merits of a dispute. It goes without saying that it is only in very exceptional cases that an arbitral award can be said to violate Swedish public policy, because the applicable law has been applied wrongfully, or because the arbitrators have failed to apply a specific provision of a specific law. There are, however, statements in the *travaux préparatoires* which seem to indicate that if arbitrators have failed to apply a mandatory rule of law, where that law is mandatory because it is intended to safeguard the interests of the general public or of a third party, such failure may lead to the award being declared invalid on grounds of violation of public policy. In the opinion of the author however, it is clear that this should occur only in very exceptional cases, if at all.

There is yet another category of situations which are likely to fall within the

public policy provisions of section 33, *i.e.* arbitral awards which order one of the parties to take actions, steps and measures which are prohibited by Swedish law. In addition, it is possible that an arbitral award which amounts to a penalty, or is punitive in nature, could fall under the public policy provision, for example, where the arbitrators have ordered one of the parties to pay punitive damages on the basis of US law.

The discussion *supra* must be seen only as possible examples. As mentioned *supra*, it is vital that the public policy provision of section 33 be applied in a very restrictive fashion. It should also be pointed out that there are no clear and watertight distinctions between the first two invalidity grounds, *i.e.* between non-arbitrability and violation of public policy. Indeed, non-arbitrability is merely an aspect of public policy. For example, with respect to claims based on criminal acts one could argue both that such claims are non-arbitrable and that an award which is based on such claims violates public policy. Both approaches would, in the opinion of the author, be equally acceptable. It is submitted however, that from a practical point of view the distinction between non-arbitrability and public policy in this situation is of little importance.

The third invalidity ground mentioned in section 33 deals with the requirement that arbitral awards be in writing and signed by the arbitrators. One consequence of this provision is that oral arbitral awards are not valid and that an award can only be rendered in writing. In addition, the arbitral award must be signed as prescribed by section 31 of the Act.

It should be noted that a finding of invalidity does not necessarily mean that the entire award is automatically invalid. If the arbitrators have decided issues which are non-arbitrable and, at the same time, issues which are arbitrable, only that part of the award which deals with the non-arbitrable issue will be void. This does presuppose, however, that it is possible to separate the non-arbitrable issues from the arbitrable ones in the award.

It is important to note that the fact that there was no arbitration agreement is no longer a ground for *invalidity* as was the case in the old Act. Lack of an arbitration agreement is now a ground on which an arbitral award may be *challenged* and is thus dealt with in section 34 of the Act. This amendment has been made on the basis of the philosophy described above, *i.e.* that only matters which pertain to the interests of the general public, or of a third party, should result in an award being invalid. The existence or non-existence of an arbitration agreement is clearly something which primarily concerns the parties to the dispute in question; they may, *e.g.* enter into an arbitration agreement, or amend an arbitration agreement, during the course of the proceedings. That is why this ground is now to be found in section 34 of the Act rather than in section 33.

*(iii) Challengeable awards*

Pursuant to section 34, paragraph 1, of the Act an arbitral award will, at the request of a party, be wholly or partially set aside:

(a) if it is not covered by a valid arbitration agreement between the parties;

(b) if the arbitrators have rendered the award after the expiration of the period decided on by the parties, or where the arbitrators have otherwise exceeded their mandate;
(c) if arbitral proceedings, according to section 47, should not have taken place in Sweden;
(d) if an arbitrator has been appointed contrary to the agreement between the parties or the Act;
(e) if an arbitrator was unauthorised due to any circumstance set out in sections 7 or 8; or
(f) if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings which probably influenced the outcome of the case.

The principal difference between section 34 of the Act and section 21 of the old Act is that sub-paragraph (a), 'valid arbitration agreement', has been reclassified as a circumstance which requires a party to challenge an award. Sub-paragraph (a) does not only apply where the parties have not entered into any valid arbitration agreement at all, but also applies where the arbitration agreement is invalid *ab initio*, or if the arbitrators have decided on a question which is not covered by the arbitration agreement.

Another change as compared to the old Act is that the ground referred to in sub-paragraph (f) *supra* has been more narrowly defined, such that an alleged irregularity of procedure must *in fact* have been likely to influence the outcome of the case. The language used in the old Act was more vague: 'which in probability may be assumed to have influenced the decision'. The new wording of sub-paragraph (f) is intended to make it more difficult to rely on this ground, in that the party who challenges an award must prove that the procedural irregularity is in fact likely to have influenced the outcome of the case.

Examples of procedural irregularities which may fall under sub-paragraph (f) include *lis pendens*, disregard of *res judicata*, violation of due process, relief in excess of claim (*ultra petita*), award based on facts not relied upon by the parties and the rendering of an incomplete award.

The second paragraph of section 34 sets out certain waiver rules. While the language has been changed from that used in the old Act, the second paragraph is not intended to change the law itself. This means that a party is not entitled to rely on a circumstance where it may be considered to have waived its right to rely on that circumstance by taking part in the proceedings without any objection based on that circumstance, or otherwise. The fact that a party has appointed an arbitrator in a case does not imply a waiver of that party's right to challenge the jurisdiction of the tribunal in question. This language is new but merely codifies existing case law.

It should also be noted that the time period within which an action must be brought under section 34 has been extended from 60 days to three months. This has been done to bring the text closer to the UNCITRAL Model Law, which provides for a three month period. Section 34 also stipulates that after the expiration of the three month period, a party may not introduce new legal grounds

for challenging the award. Again, while the language is new, it codifies existing case law. It should be noted that the term 'ground' does not refer to the different grounds enumerated in section 34, but rather to the more legal-technical concept of a 'legal ground'. This means, *e.g.* that if a party has challenged an award by arguing that one of the arbitrators was not qualified to act as arbitrator, it could not, after the expiration of the three month period, argue that *another arbitrator* was not qualified to act. On the other hand, a party would *not* be prevented from adjusting certain sets of fact which come within the same legal ground. For example, if a party has argued that an arbitrator should be prevented from acting as arbitrator because he is the nephew of the other party, it could argue, even after the expiration of the three month period, that the same arbitrator is actually the son of the other party.

*(iv) Exclusion agreements*

A new provision in the Act, section 51, introduces the concept of exclusion agreements into Swedish arbitration statutes. Section 51 stipulates that two non-Swedish parties may enter into an exclusion agreement, by which they waive in advance the right under section 34 of the Act to have recourse against awards. This presupposes, however, that the parties in question are commercial parties and that the relationship between them is of a commercial nature. Consequently, section 51 stipulates that if neither of the parties in a commercial relationship has its domicile, or place of business, in Sweden, the parties may, by agreement in writing, exclude or limit the applicability of the grounds for setting aside awards which are listed in section 34 of the Act. It is important to note that the exclusion agreement must be in *writing* and that it must *specifically* refer to the parties' waiver of the right to challenge an award pursuant to section 34 of the Act. This means, *e.g.* that it will not be sufficient for parties to refer to institutional rules, such as *e.g.* the ICC Rules, which may contain clauses similar to an exclusion agreement. Instead, under section 51, as mentioned, the parties must *explicitly* state that they waive their rights pursuant to section 34.

Section 51 also means that it is not possible to waive the invalidity grounds set out in section 33. Invalidity is beyond the control of the parties; it is beyond party autonomy. Since the invalidity grounds have been formulated with a view to safeguarding the interest of the general public and/or of third parties, it is only logical that parties cannot waive such grounds.

In accepting exclusion agreements, the Swedish legislature was acting on the assumption that an award with respect to which an exclusion agreement has been concluded would still be scrutinised at the place of enforcement, again assuming that such enforcement would *not* take place in Sweden. In other words, it was assumed that an arbitral award would be subject to some sort of formal control in some jurisdiction. To the extent that an award, which is covered by an exclusion agreement, is to be enforced in Sweden, section 51 stipulates that such an award will be recognised and enforced in Sweden on the basis of the requirements and conditions stipulated for foreign arbitral awards. It will, in other words, be possible

for the respondent in enforcement proceedings to rely on all the grounds enumerated in the New York Convention and in sections 53 to 60 of the Act.

*(v) Remission*

Under the old Act, a successful challenge under section 21 resulted in a court judgment setting aside the award in whole or in part. Issues dealt with in the award had therefore to be addressed anew in a subsequent and separate arbitration. Inspired by the UNCITRAL Model Law and by the more flexible approach taken, *e.g.* in England and Switzerland, the Act introduces a new remedy - remission - with a view to creating greater flexibility and speed. The remedy in question is regulated by section 35, which provides that a court may stay an action concerning the invalidity or setting aside of an award for a certain period of time, to provide the arbitrators with an opportunity to resume the arbitration proceedings, or to take other action which in the opinion of the arbitrators would eliminate the grounds for the invalidity or for the setting aside of the award, *provided* either (1) that the court has found the action to be substantiated and either of the parties has requested a stay, or (2) that both parties have requested a stay.

This means that if *both parties* ask the court to stay the proceedings, the court must do so. On the other hand, if only one of the parties requests a stay, the court can grant this request only if it finds that the action to challenge the award is substantiated. In practice this means that, before the court can draw such a conclusion, it must usually hold a main hearing with the parties during which it will become clear to the court that the proceedings to have the award declared invalid or set aside will succeed. Alternatively, it may be obvious from the outset that the action to challenge the award is substantiated, and the court may therefore grant a request to stay the proceedings without holding a main hearing.

The purpose of section 35 is to give arbitrators the opportunity to remedy procedural defects which could have led to the setting aside of the award, or its being declared invalid. This presupposes that the procedural defect in question is of such a nature that it is possible to remedy. If one of the arbitrators is disqualified, for example, it will be of little use to remit the case to a tribunal of which that arbitrator is a member. On the other hand, if the procedural defect is such that it could be remedied, *e.g.* by hearing a witness, the arbitrators would be expected to take such action. This would happen only on the basis of the further assumption that the arbitrators are willing to do so. It is not clear that arbitrators have a *duty* to participate in new arbitral proceedings, the sole objective of which would be to remedy procedural defects.

If the arbitrators do render a new award, a party may within such period of time as determined by the court, and without filing a new complaint, challenge the new award in so far as such complaint is based on the resumed arbitration proceedings, or on amendments made to the first award.

Even though it is possible to foresee a number of procedural complications in the application of section 35, one must always keep the alternative in mind, *i.e.* the setting aside of the award, or having it declared invalid. This new provision means

that it may be possible to prevent such dramatic consequences in situations where a procedural defect can be remedied by arbitrators.

### *(b) Enforceability of Arbitral Awards*

In discussing the enforceability of arbitral awards, there are three distinctions to be made: (i) enforcement abroad of Swedish arbitral awards, (ii) enforcement of foreign arbitral awards in Sweden and (iii) enforcement of Swedish awards in Sweden.

The three situations are addressed in turn *infra.*

#### *(i) Enforcement abroad of Swedish awards*

Enforcing Swedish arbitral awards abroad is of course a matter entirely for the laws of the enforcing state. Since Sweden has ratified the New York Convention without any reservation or reciprocity requirements, which are available to members of the New York Convention, the Convention should as a rule not bar Swedish awards from being enforced abroad. In addition, if the award is rendered in Sweden the arbitration agreement would generally be regarded as a Swedish arbitration agreement and would be governed by Swedish law. Since Sweden has generous rules regarding the validity of arbitration agreements, an arbitral award rendered on the basis of such an agreement will rarely be refused enforcement by reason of invalidity of the agreement.

#### *(ii) Enforcement of foreign arbitral awards in Sweden*

The last chapter of the Act incorporates provisions which were previously found in the 1929 Act Concerning Foreign Arbitration Agreements and Awards (the 'Foreign Arbitration Act'), which was the Swedish legislation introduced to implement the New York Convention.

The opening section, section 53 of the Act, provides that an award which has been rendered abroad shall be considered a foreign award and that in applying the Act an award shall be considered to have been made in the state where the arbitration took place. In other words, under Swedish law, a territorial test is applied, which means that all awards rendered in a country other than Sweden are considered to be foreign and thus enforceable under the New York Convention and the corresponding Swedish legislation, *i.e.* sections 54 to 60 of the Act. It should also be noted that for present purposes it is immaterial under Swedish law which arbitration law, or which system of arbitration procedure, has been used in rendering the award.

Sections 54 to 60 of the Act incorporate the relevant provisions of the New York Convention. In ratifying the New York Convention, Sweden did not exercise either the reciprocity reservation or the commercial nature reservation which were available to the signatories. Accordingly, foreign arbitral awards wherever outside Sweden they are rendered, and whether of a commercial character or not, are enforceable in Sweden pursuant to the New York Convention.

The circumstances under which a foreign arbitral award will be refused recognition and enforcement are set out in sections 54 and 55 of the Act. These circumstances refer to form and procedure and to Swedish public policy, but not to questions of substance. Section 54 lists the five grounds, which mirror Article V of the New York Convention, upon which an objection to recognition and enforcement may be based. In accordance with the underlying philosophy of the New York Convention, the burden of establishing the existence of those grounds lies in each case on the party opposing recognition. The grounds mentioned in section 54 are the following:

(1) invalidity of arbitration agreements;
(2) violation of procedural due process;
(3) terms of submission exceeded;
(4) improper composition of the arbitral tribunal or improper arbitral procedure; and
(5) arbitral award not binding.

Section 54, by and large, corresponds to section 7 of the Foreign Arbitration Act. There are some minor amendments, however, which have been made with a view to bringing the language of the Act into closer conformity with the text of the New York Convention. Generally speaking, these changes and amendments are of purely stylistic and editorial nature.

With respect to items 3 and 4 *supra*, however, it should be noted that one substantive change has been made. Under the Foreign Arbitration Act, there was a requirement that the arbitral award be ineffective in the state where it was given, or under whose law it was given, for the arbitral award to be refused recognition and enforcement in Sweden. This was a requirement which was not in conformity with the New York Convention and which in fact went further than the New York Convention. This additional requirement has now been deleted from the Act, so that section 54 corresponds to the relevant provision of the New York Convention.

Section 55 of the Act mentions two further grounds on the basis of which recognition and enforcement of foreign arbitral awards will be refused, *i.e.* that the award concerns a question which is not arbitrable under Swedish law, or that recognition and enforcement of the award would violate Swedish public policy. In fact, the arbitrability requirement is part of Swedish public policy; accordingly the first ground is simply an example of the second. In the rare cases when these two grounds may come into play, the courts will take notice thereof *sua sponte*.

A new, and from a practical point of view, important provision is to be found in section 60 of the Act, which provides that the Svea Court of Appeal, which has exclusive jurisdiction with respect to the recognition and enforcement of foreign arbitral awards, may in cases where enforcement of a foreign arbitral award is sought, at the request of a party, impose interim security measures. Under the old Act such decisions could be taken only by the district courts, *i.e.* the courts of first instance.

*(iii) Enforcement of Swedish awards in Sweden*

If a party has obtained a Swedish award, which is not of a purely declaratory nature, but requires a party to take action in some way, the winning party may wish to enforce the award in Sweden. In such a case he will have to turn to the Swedish execution authority. Unlike a judgment of a Swedish court, an arbitral award is not immediately enforceable. The execution authority must make a summary check of the award prior to the execution thereof. When applying for such measures to the execution authority, the applicant must attach the original, or a certified copy, of the award as well as of the arbitration agreement. The activities of the execution authority are regulated by the 1981 Enforcement Procedure Code, as amended, which stipulates that the execution authority must check the award to make sure that it is not invalid under the Act. The execution authority will not request proof from the applicant unless specific circumstances require it. If the authority finds that there is reason to believe that the award is invalid, it will instruct the applicant to go to court and have the issue of validity decided there.

The authority will not, however, decide whether or not the award may be set aside on the basis of section 34 of the Act, but will rather proceed to execution of the award. If an application to set aside an award or to have it declared invalid has been submitted to a court of law, the court in question will also rule on the question of execution of the award.